



Federal Communications Commission
Washington, D.C. 20554

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Koor Communications, Inc.
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In re: **Koor Communications, Inc.**
WQTH(AM), Claremont, New Hampshire
Facility ID No. 85956
File No. BP-19970328AB as modified by
BMAP-20050118AAN

Petition for Reconsideration

Dear Counsel:

We have under consideration a Petition for Reconsideration (the "Petition") filed by Koor Communications, Inc. ("Koor"), former permittee of Station WQTH(AM), Claremont, New Hampshire, seeking reconsideration of the letter dated December 20, 2006 (the "*Letter Decision*"),¹ denying Koor's request for further tolling of its construction deadline or, in the alternative, waiver of Section 73.3598 of the Commission's Rules (the "Rules").² For the reasons set out below, we deny the Petition.

Background. Koor received a construction permit for WQTH(AM) on November 20, 1997.³ On January 16, 2005, in the Auction 84 filing window, Koor tendered a major change

¹ *Letter to Dennis Kelly, Esq.*, Dec. 20, 2006.

² 47 C.F.R. § 73.3598 ("Section 73.3598").

³ The initial construction permit, issued November 20, 1997, required Koor to complete construction within eighteen months. Thereafter, the expiration date of the Koor construction permit, and that of other permittees, was extended to December 21, 2000. See *1998 Regulatory Review - Streamlining of Mass Media Applications, Rules and Processes*, Report and Order, 13 FCC Rcd 23056, 23092 (1998) ("*Streamlining Order*"), recon. granted in part and denied in part, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17536 (1999) (*Streamlining MO&O*). Pursuant to 47 C.F.R. § 73.3598(b), the construction permit tolled when Koor filed a judicial appeal of a zoning decision denying Koor access to its initially proposed site. Thereafter, and before the appeal had been decided, Koor filed its major change application to relocate its station to a new site and to change its community of license. The litigation (concerning the former site) remained in the courts until August 31, 2005. When the tolling period ended, the staff adjusted the permit expiration date to June 13, 2007. The staff granted Koor's major change application on March 15, 2006. On August 31, 2006, Koor requested that the construction deadline be extended, at a minimum, to March 15, 2009. It argued that, following grant of its major amendment, the "clock" for the construction deadline should have been reset to give Koor an additional three years to construct, i.e., it argued that construction permits issued pursuant to a major change application should be

application (the “2005 Modification Application”) to change the station’s transmitter site and community of license. The staff granted the application on March 15, 2006. Consistent with Commission policy, the modified construction permit stated, “the authority granted herein has no effect on the [June 13, 2007] expiration date of the underlying construction permit.” Koor, however, failed to construct the station by June 13, 2007, and its construction permit, which had been tolled during the pendency of litigation involving its initial site, expired by its terms on June 13, 2007. Earlier, Koor had requested further tolling of its permit, or waiver of the tolling provisions of Section 73.3598, estimating that it could complete construction by October 1, 2008, or October 1, 2009.⁴ The *Letter Decision* denied the tolling and waiver request.

In its Petition, Koor claims that the staff’s denial of Koor’s request for further tolling or waiver of Section 73.3598(b) was unwarranted. First, Koor argues that the Commission “deprived [Koor] of six months and fifteen days of its remaining construction period by FCC inaction on the modification application – a circumstance clearly beyond the control of the applicant.”⁵ Second, Koor claims that it has now purchased a transmitter and has appeared before the cognizant zoning board “to get a sense of the Board (which is favorable).”⁶ Third, Koor asserts that it has spent \$ 228,025 in legal fees and other costs in connection with the proposed station.⁷

In denying Koor’s waiver request, the *Letter Decision* stated that “[c]onsistent with Section 319(b) of the Act, waivers of the three-year construction deadline are granted for rare and exceptional circumstances beyond the permittee’s control.”⁸ Koor notes that the term “rare and exceptional” does not appear in Section 319 of the Communications Act of 1934, as amended (the “Act”), which provides for forfeiture of construction permits unless failure to construct is due to “causes not under the control of the grantee.”⁹ Therefore, Koor argues, by using the term “rare and exceptional” the staff “attempted to read into the statute criteria that are not found in the

treated in the same manner as initial construction permits. On Nov. 7, 2006, Koor amended its request to report that it had not yet obtained zoning approval for its new site and argued that waiver of Section 73.3598(b) was warranted because it had encountered delays “not under control of the grantee” within the meaning of 47 U.S.C. § 319(b). The December 20, 2006, *Letter Decision*, however, found that Koor was not entitled to further tolling of its construction deadline because the factors that Koor alleged entitled it to additional tolling, *i.e.*, the sums it had spent toward construction, the track record of its principal, winter weather in the area, pendency of zoning proceedings, and the presence of a nuclear power plant within the station’s proposed coverage area, did not qualify for tolling under Section 73.3598(b). *Letter Decision* at 1-2. The staff concluded that Koor had failed to demonstrate that a waiver of the Section 73.3598(b) tolling provisions was warranted. It pointed out that Koor’s claim that it might receive zoning approval for its new site in three months was speculative. It also found that each reason Koor advanced for its waiver request involved matters within Koor’s control. *Id.* at 2-3.

⁴ *See id.* at 2.

⁵ Petition at 3.

⁶ *Id.*

⁷ Koor claims to have spent \$ 98,700 in legal fees (including the zoning proceeding and appeal to the New Hampshire court), \$ 58,000 in engineering fees, \$ 8,725 in Commission filing fees, \$2,600 for surveyors and consultants and \$ 60,000 for equipment. *Id.* at 4.

⁸ *Letter Decision* at 5 (citing *Streamlining MO&O*, 14 FCC Rcd at 17541).

⁹ *Petition* at 5. (“Section 73.3598 of the FCC’s rules illegally circumscribes the range of ‘causes not under control of the grantee’ that the Commission may consider in determining whether to allow additional time for the construction of a broadcast station.” * * * “Refusal to extend the expiration of the construction permit would be illegal as ‘otherwise not in accordance with law.’”(citing 5 U.S.C. § 706(2)(A)).

statute.”¹⁰ In so doing, Koor contends, the staff “unlawfully narrows the intent and wording of Section 319(b), thereby violating the Administrative Procedure Act.”¹¹

Koor also contends that the Commission impermissibly narrowed the reach of Section 319(b) of the Act when it adopted Section 73.3598 and, therein, described the specific causes that would be deemed “not under the control of the permittee.”¹² Koor argues, “[h]ad Congress wanted the FCC to only consider certain reasons, it was up to Congress, not the FCC, to narrow Section 319(b).”¹³

Koor alleges that, by not further tolling Koor’s construction permit or granting a waiver of Section 73.3598(b), the staff engaged in an unconstitutional “taking” within the meaning of the Fifth Amendment to the United States Constitution.¹⁴ Koor also faults the staff for not finding that the prevailing winter weather conditions in New Hampshire justified a waiver of Section 73.3598(b).¹⁵ It contends that the staff was “irrational” when it applied, to Koor’s proposed 5-tower AM array, the same three-year construction period allowed for relatively simple installations, *e.g.*, pole-mounted FM translators.¹⁶ Koor also argues that the staff treated Koor inconsistently because Koor’s circumstances parallel those of certain analog television stations that are converting their facilities to digital operation and have been granted the equivalent of extensions of time to complete the conversion.¹⁷ Finally, Koor cites a 1929 Court of Appeals decision for the proposition that the Federal Radio Commission should grant a construction permit if a permittee has expended substantial amounts of money in preparing for station construction but is unable timely to construct for reasons beyond its control.¹⁸

Discussion. The Commission will consider a petition for reconsideration when the petitioner shows either a material error in the Commission’s original order, or raises additional facts not known or existing at the time of the petitioner’s last opportunity to present such matters.¹⁹ A petition for reconsideration that simply reiterates arguments that were previously considered and rejected will be denied.²⁰ We find that Koor’s Petition reiterates its earlier arguments and neither demonstrates material error or omission in the *Letter Decision*, nor raises any material new facts unavailable at the time of its initial tolling or waiver request. Nonetheless, we briefly address Koor’s arguments below.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 5.

¹³ *Id.*

¹⁴ *Id.* (“Koor further submits that refusal to extend the time period for construction would be contrary to Koor’s right not to be deprived of a property right without due process of law under Amendment 5 to the federal Constitution . . .”).

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.* (citing *Richmond Development Corp. v. Federal Radio Commission*, 35 F.2d 883 (D.C. Cir. 1929) (“*Richmond*”).)

¹⁹ See 47 C.F.R. § 1.106. See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964) (“*WWIZ*”), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

²⁰ See *WWIZ*, 37 FCC at 686.

First, the staff's denial of Koor's waiver request was not a "taking" of Koor's property within the meaning of the Fifth Amendment. It is well established that there is no property interest in a Commission permit or license.²¹

Second, the staff correctly rejected Koor's argument that Section 73.3598(b) should be waived because winter conditions in New Hampshire may be harsh. In the *Streamlining MO&O* the Commission made it clear that differences in regional weather conditions do not excuse permittees from timely constructing their authorized facilities.²²

Third, the asserted complexity of Koor's system relative to other broadcast facilities, such as translators, does not justify waiving Section 73.3598(b). The *Streamlining Order* provided a uniform three-year construction period for all broadcast facilities. We take notice that, in the normal course, diligent broadcast permittees, including those constructing AM stations with directional arrays, have completed construction of their authorized facilities within three years.²³

Fourth, the staff's reference, in the *Letter Decision*, to "rare and exceptional" circumstances that merit tolling of a construction permit - for reasons other than those stated in Section 73.3598(b)(i)-(ii) - tracks the language in the *Streamlining MO&O*.²⁴ It is clear from the context, there, that the Commission was not establishing a new "rare and exceptional" waiver criterion; it was merely explaining that it anticipated that circumstances justifying a waiver, other than those specifically mentioned in Section 73.3598(b)(i)-(ii), would, in fact, be rare and exceptional, *i.e.*, not common and routine.²⁵ In so saying, the Commission neither restricted nor extended the reach of Section 319(b) of the Act.

Similarly, Koor is wrong in stating that "Section 73.3598 . . . illegally circumscribes the range of 'causes not under the control of the grantee' that the Commission may consider in determining whether to allow additional time for the construction of a broadcast station."²⁶ The Rule states that the construction period "shall toll" for the reasons enumerated therein - not that it "shall toll only" for those reasons. Thus, as the *Letter Decision* recites²⁷ - and Koor acknowledges by filing its waiver request - the circumstances described in Section

²¹ See, e.g., *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1460 (D.C. Cir. 1985); *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984). See also *Mobile Relay Associates*, 457 F.3d 1,12 (D.C. Cir. 2006) and cases cited therein.

²² See *Streamlining MO&O*, 14 FCC Rcd at 17539. (Finding that factors such as weather may cause construction delays, but - given the expanded three-year construction period - such factors are not so insurmountable that they excuse parties' lack of diligence in planning and implementing their authorized facilities.)

²³ We reject Koor's claim that the modified construction permit should have extended the construction deadline by three years. See *Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167, 19171 (2001) ("a construction deadline would not be extended when, as here, the Commission modifies a station's original permit at the station's request . . .").

²⁴ *Streamlining MO&O*, 14 FCC Rcd at 17541. ("We realize that there may be rare and exceptional circumstances other than those delineated here which would warrant the tolling of construction time, *i.e.*, circumstances in which, for reasons not discussed here, a permittee is prevented from completing construction within three years for reasons beyond its control such that the permittee would be entitled to tolling of the construction time under Section 319(b). In these very limited circumstances, we will entertain requests for waiver of our strict tolling provisions.")

²⁵ *Id.*

²⁶ Petition at 5.

²⁷ *Letter Decision* at 3.

73.3598(b)(i)(ii) are not exhaustive of the those under which the Commission will toll a construction permit deadline.

Fifth, the fact that Koor had to await the opening of a filing window to tender its 2005 Modification Application and then await Commission processing of the application did not somehow “deprive” Koor of a portion of its unencumbered construction period and thus justify a waiver. As noted *supra*, waiver of Section 73.3598(b) is justified only when failure to construct is attributable to “causes not under control of the grantee.” An applicant’s failure to factor the Commission’s auction and application processing procedures into its planning is an error entirely its responsibility and wholly within its control.²⁸

Sixth, assuming, *arguendo*, that *Richmond* - a 1929 case involving the Federal Radio Commission - is still good law, it would be inapposite here. Although Koor may have incurred significant expenses in connection with its permit, we cannot find that, as in *Richmond*, “completion [of the station] was prevented by causes not under [the permittee’s] control.”²⁹ Koor’s decision not to prosecute its original site and, instead, to file for a change in site and principal community, was not mandated by the Commission, local regulatory authority, or any other third party.³⁰ It was Koor’s voluntary, and speculative, business decision.³¹ We also note that, in *Richmond*, the construction permit was extended on a finding that the permittee “acted . . . with diligence its efforts to construct the station within the time allowed by the permit.” 35 F.2d at 884. Here, however, there is no indication that Koor has diligently pursued permission to use its new site. For example, as of the date of its Petition - which was filed only 145 days before Koor’s construction permit expired - Koor had only “begun the process of filing for the necessary permits.”³² Koor could well have sought those permits before it filed its modification application or while it waited for the filing window to open and during the time the Commission was

²⁸ See *Dennis J. Kelly*, Letter, 23 FCC Rcd 4786-4788 (MB 2008) (citing *Streamlining MO&O*, 14 FCC Rcd at 17540. (“The Commission stated that its intention ‘was simply, within the bounds of the statute, to establish an incentive for all applicants to plan construction carefully, even prior to applying for a permit and, once a permit is received, to bring to the construction process the same degree of urgency brought to other business endeavors.’ In that way, the Commission sought to minimize instances in which applicants filed for permits without taking preliminary steps to ensure that they could begin -- much less complete-- construction.”)

²⁹ *Richmond*, 35 F.2d at 884. We also note that, in this early Federal Radio Commission case, the court found that the delay incurred by extension of a one-month permit had no significant public interest consequences. *Id.* at 885. Sixty-nine years later, in the *Streamlining Order*, the Commission noted that unwarranted extensions of construction permits had resulted in “warehousing” of spectrum with a concomitant denial of new service to the public. It therefore found that strict enforcement of three-year construction deadlines was “responsive to statutory requirements” and, “strike[s] the balance between the fundamental public interest in expediting new broadcast service and preventing the warehousing of spectrum” *Streamlining Order*, 13 FCC Rcd at 23094.

³⁰ Thus, Koor does not qualify for further tolling. The *Streamlining MO&O* specifically stated that modification applications “attributable to the permittee” would not toll construction deadlines. *Streamlining MO&O*, 14 FCC Rcd at 17541, n.56. (“We reiterate that we will afford no additional time to permittees who make a business decision not to use the site approved in the construction permit”)

³¹ Koor claims it filed its major change application on the speculation that the “City of Lebanon might never allow a multi-tower, directional AM array to be erected” at Koor’s original authorized site.” Petition at 2 (emphasis supplied). See *Royce International Broadcasting Co.*, Memorandum Opinion and Order, 45 CR 329 (2008). (“The selection of a transmitter site is an independent business decision within a permittee’s control.”(citing *Streamlining MO&O*, 14 FCC Rcd at 17539)).

³² Petition at 3.

processing its application.³³ Finally, we reject Koor's premise that the Commission's granting Special Temporary Authorizations to television stations to provide additional time for conversion to digital operation is inequitable to Koor. We see no decisional similarity between AM broadcast and digital television stations and note that, in the *Streamlining MO&O*, the Commission established a different construction policy for DTV stations.³⁴

Decision/Action. Koor has neither demonstrated material error nor omission in the *Letter Decision*. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed January 19, 2007, by Koor Communications, Inc. IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³³ See *Birach Broadcasting Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 3141, 3146 (2008). ("The Commission has long advised permittees to commence the local zoning process at the earliest possible date")

³⁴ See, e.g., *Streamlining MO&O*, 14 FCC Rcd at 17541. (Tolling provided for certain low power television stations "due to the unique nature of this secondary service and the impact of the advent of DTV upon the spectrum available for these permittees." Tolling also provided for DTV stations "where a necessary modification application or rule making proposal was delayed while the Commission finalized its DTV allotment table.") The Commission found no such unique circumstances with respect to AM broadcast facilities, directional or otherwise.